

89-325 (1)

No. _____

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IN THE

Supreme Court of the United States

October Term, 1989

ANDREW P. DZINGLSKI,

Petitioner,

vs.

WEIRTON STEEL CORPORATION, RETIREMENT
COMMITTEE OF WEIRTON STEEL CORPORATION
RETIREMENT PLAN,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

DANIEL W. COOPER*
CHRISTOPHER LEPORE
COOPER & LEPORE
Greentree Commons, Suite 100
381 Mansfield Avenue
Pittsburgh, Pennsylvania 15220
(412) 937-1220

Attorneys for Petitioner
Andrew P. Dzinglski

* *Counsel of Record*

Batavia Times Publishing Co.
Harold L. Berkoben
Pittsburgh, Pa. (412) 881-7463

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Questions Presented

Whether the Retirement Committee of Weirton Steel Corporation, a plan fiduciary under ERISA, is required to inform a discharged employee (plan participant) who applies for early retirement benefits, the reasons by the Employer, Weirton Steel Corporation, refused to agree to the early retirement benefits. Under these circumstances, has the plan participant received a fair hearing under 29 U.S.C. 1133 when the fiduciary does not advise the discharged employee of the specific reasons for the denial and, therefore, the discharged employee cannot present evidence to the plan fiduciary to support his application and rebut the reasons for the denial?

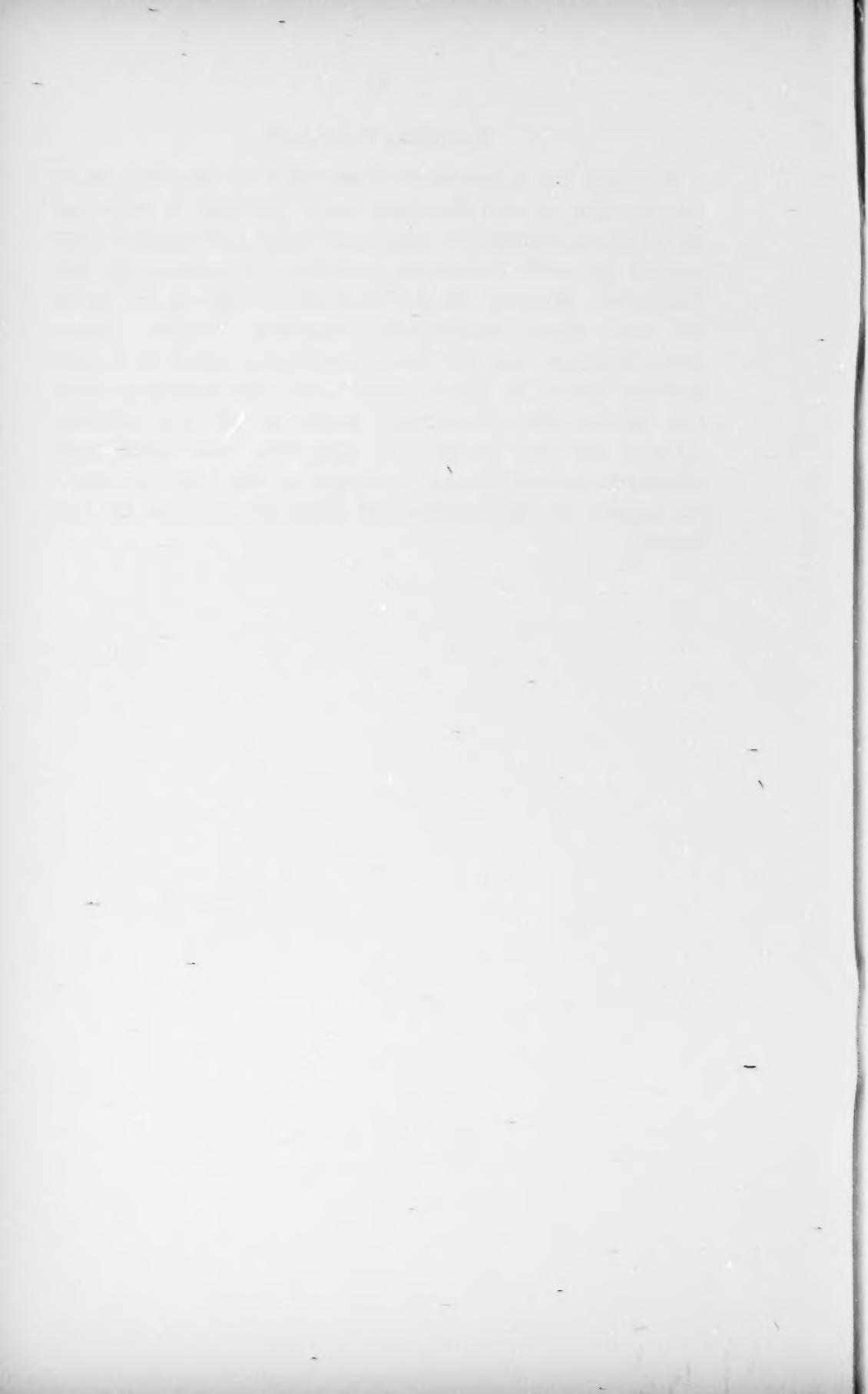


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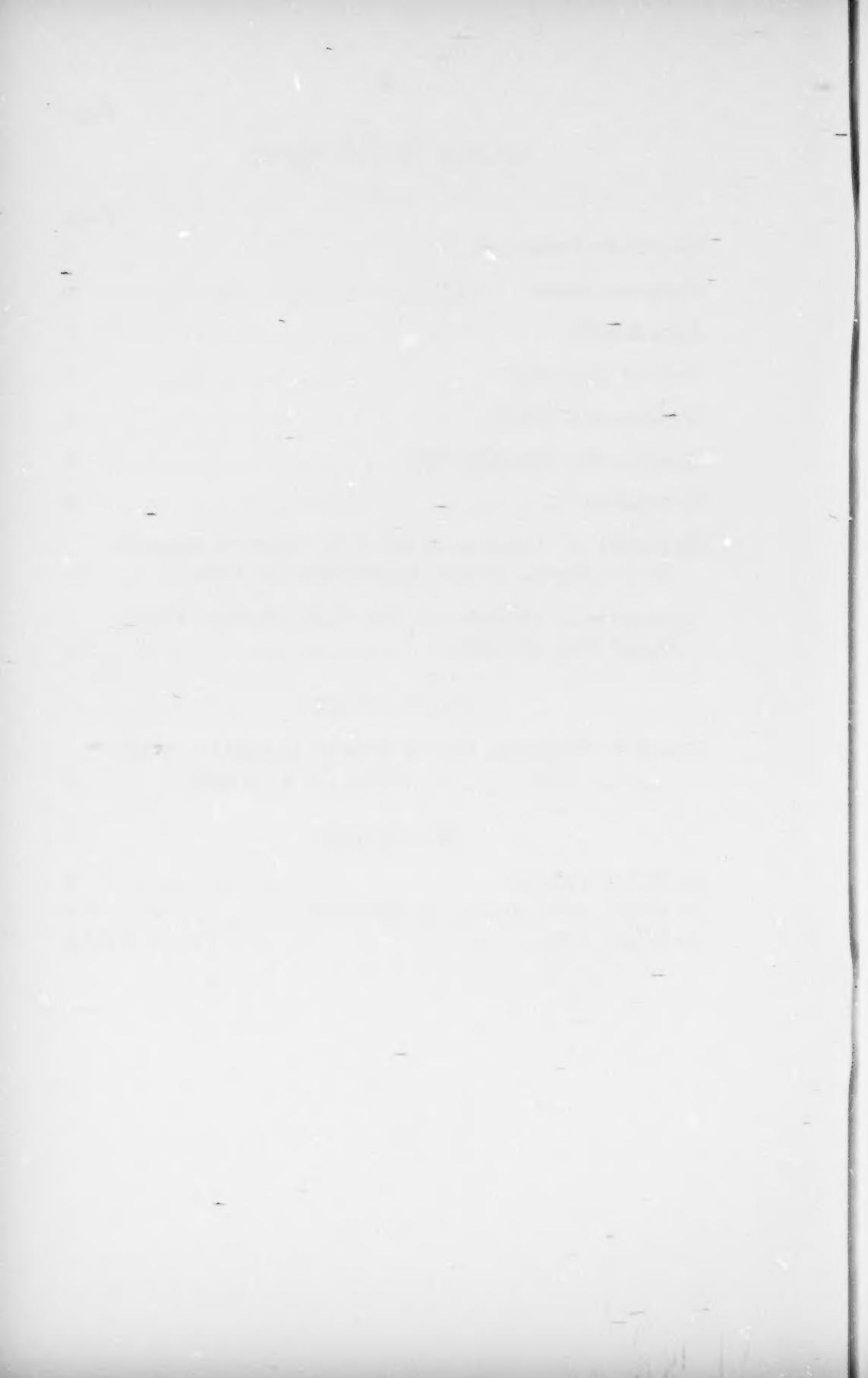
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CORPORATION RETIREMENT PLAN,

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**PETITION FOR A WRIT OF CERTIORARI TO
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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States; Andrew P. Dzinglski, Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit on May 19, 1989.

Opinions Below

The Findings of Fact and Conclusion of Law and Order, dated May 19, 1988, by U.S. District Judge William P. Gray, by special assignment to the U.S. District Court for the Northern District of West Virginia is printed in Appendix B, hereto, page 14a. The Opinion by the U.S. Court of Appeals for the Fourth Circuit, dated May 19, 1989, is printed in Appendix A, hereto, page 1a.

Jurisdiction

The Judgment of the U.S. Court of Appeals for the Fourth Circuit, Appendix B, page 20a, was entered on May 19, 1989. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

Statute Involved

The applicable statute is 29 U.S.C. 1001, *et seq.*, (ERISA). The specific portion is 29 U.S.C. 1133:

Claims procedure.

In accordance with regulations of the Secretary, every employee benefit plan shall—

- (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
- (2) afford a *reasonable opportunity* to any participant whose claim for benefits has been denied for a *full and fair review* by the appropriate named fiduciary of the decision denying the claim.
(Emphasis added.)

Statement of Case

Andrew P. Dzinglski applied in October 1984 for early retirement benefits. He met the years of service and age requirement. His application was denied because his Employer, Weirton Steel Corporation, refused to agree to the granting of early retirement benefits. No reasons were given for the Employer's refusal. Mr. Dzinglski filed an Appeal to the Retirement Committee of Weirton Steel. The Committee did not provide Mr. Dzinglski the reasons for Weirton's refusal and, denied the Appeal. Mr. Dzinglski then filed suit, which was decided on May 19, 1988, in favor of Defendants. An Appeal to the Court of Appeals for the Fourth Circuit resulted in favor of Defendants, by Opinion dated May 19, 1989.

The basis for jurisdiction before the District Court is 29 U.S.C. 1001, *et seq.*, as amended.

Reasons for Granting Writ

The reason for granting the Writ is that the interpretation given to 29 U.S.C. 1133 by the Court of Appeals, the District Court, and the Retirement Committee effectively renders 29 U.S.C. 1133 a *nullity*.

If a Plan Fiduciary does not have to inform a Plan Participant of the reasons for the denial of his application for benefits, then what is the point of providing an appeal and hearing under 29 U.S.C. 1133? The Courts below have stated that it is sufficient for the Plan Fiduciary to simply say to the Plan Participant:

"Your application for benefits is denied because the employer refuses to agree to the application."

According to the Courts below, the Plan Participant is not entitled to know *why* the Employer refuses. Accordingly, the Plan Participant cannot present any evidence to the Fiduciary, who supposedly is to act in the best interest of the Plan Participant, so the Fiduciary can act as a real Fiduciary and not merely rubber-stamp the Employer's decision. That is critical because Weirton in this case acted in a dual capacity as the Employer and as the Plan Administrator.

Stated bluntly, there is no point in providing for an internal appeals procedure under 29 U.S.C. 1133, if the Plan Participant is not allowed to know the specific reasons for the Employer's refusal to agree to the benefits. The Court's decision renders the appeals procedure an empty right and futile. We do not seek to transform the appeals procedure of 29 U.S.C. 1133 into a forum for a wrongful discharge action, as alleged by the Court of Appeals. We do not seek reinstatement and pay. We seek the benefits under the Pension Plan as protected by ERISA.

Our reasons for granting the Writ are consistent with this Court's decision in *Bruch v. Firestone Tire & Rubber Company, et al.*, _____ U.S. _____, 109 S. Ct. 43 (1989), which requires the federal courts to review *de novo* benefit eligibility determinations.

In this case, there has been no *de novo* review by either the Plan Fiduciary or the Courts below. The decision to deny benefits was made by Weirton Steel Corporation, the Employer. That decision was rubber-stamped by the Plan Fiduciary, the Retirement Committee of Weirton Steel Corporation, and not reviewed *de novo* by the Courts below.

The Court of Appeals stated that:

The cases on which Dzinglski relies for the proposition that the Committee should have disclosed to him the totality of evidence supporting the denial of benefits are inapposite; in all of them, *Brown v. Retirement Committee of Briggs & Stratton*, 797 F.2d 521, 532-33 (7th Cir. 1986); *Short v. Central States, S.E. & S.W. Areas Pension Fund*, 729 F.2d 567, 574-75 (8th Cir. 1984); *Richardson v. Central States, S.E. & S.W. Areas Pension Fund*, 645 F.2d 660, 665 (8th Cir. 1981); *Wardle v. Central States, S.E. & S.W. Areas Pension Fund*, 627 F.2d 820, 827 & 828, n.17 (7th Cir. 1980), the trustees were vested with the discretionary authority to grant or deny benefits. Here the Retirement Committee is not vested with discretionary authority. The Retirement Committee can only determine whether Dzinglski met the eligibility standards of the plan, one of which was that Weirton determine his retirement to be in its interest. Appellant presented no evidence that Weirton did not and, accordingly, the Retirement Committee had to deny appellant benefits. Pursuant to *Firestone Tire & Rubber Co. v. Bruch*, 57

U.S.L.W. 4194 (U.S. Feb. 21, 1989), we review the trustee's decision *de novo*, and we find it conforms to the terms of the plan. (p. 9a-10a).

The Court is requiring the Plan Participant to present evidence of why his retirement would be in the Employer's interest. Yet, the Court does not require that the Plan Participant be informed why the Employer believes it is not in its best interest. Moreover, if the Court is stating that the Plan Fiduciary had no discretionary authority to grant or deny benefits, then the Plan Participant did not receive a full and fair hearing under 29 U.S.C. 1133 for the further reason that the Plan Fiduciary could not act as a true, independent fiduciary because the Plan restricted the Fiduciary's duties to the extent that the Fiduciary acts merely as a clerk to verify name, age, years of service, and does the Employer agree to the application for benefits.

We respectfully submit that this case involves substantial issues, the rights and obligations of Plan Participants and Plan Fiduciaries under Section 1133 of ERISA. We believe that both the Court of Appeals and the District Court applied erroneous legal principles in restricting the scope of 29 U.S.C. 1133 such that Section 1133 does not provide to Plan Participants its intended meaning of a full and fair hearing. If a plan participant is denied ERISA benefits, he should be advised of the specific reasons so he can *effectively* appeal the denial under the claims procedure set by 29 U.S.C. 1133, and so the Court can properly review the decision *de novo*. We submit that the Court cannot properly review *de novo* the decision by the plan fiduciary if the plan fiduciary does not require the Employer to state the specific reason of its refusal to agree to the application for benefits and consequently the plan fiduciary does not advise the plan participant of the specific reasons.

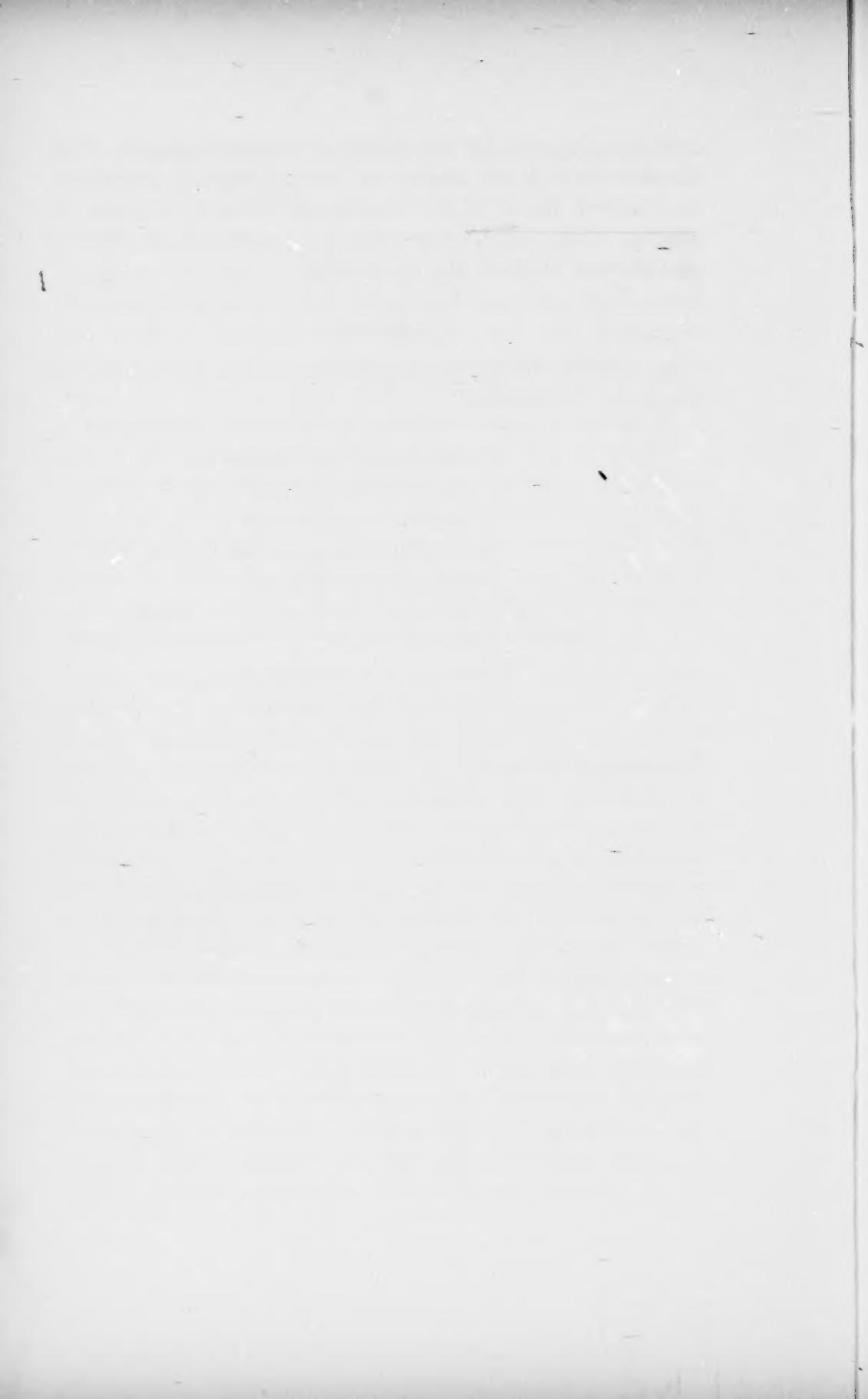
If the decision by the Court of Appeals stands, then there is no point in having an internal appeals procedure as required by 29 U.S.C. 1133, and there is no point in stating that the courts are to review *de novo* the decisions of ERISA plan fiduciaries.

Conclusion

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted.

DANIEL W. COOPER*
CHRISTOPHER LEPORE
COOPER & LEPORE
Greentree Commons, Suite 100
381 Mansfield Avenue
Pittsburgh, Pennsylvania 15220
(412) 937-1220
Attorneys for Petitioner
Andrew P. Dzinglski

* *Counsel of Record*



APPENDIX A

**Opinion of the United States Court
of Appeals for the Fourth Circuit,
Dated May 19, 1989**

**UNITED STATES COURT OF APPEALS
For the Fourth Circuit**

No. 88-3877

ANDREW P. DZINGLSKI,
Plaintiff-Appellant,
versus

**WEIRTON STEEL CORPORATION;
RETIREMENT COMMITTEE OF WEIRTON STEEL
CORPORATION RETIREMENT PLAN,**
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. William P. Gray, Senior District Judge for the Central District of California, sitting by designation. (C7A 85-126)

Argued: March 7, 1989

Decided: May 19, 1989

Before CHAPMAN and WILKINSON, Circuit Judges,
and DOUMAR, United States District Judge for the Eastern District of Virginia, sitting by designation.

Christopher Lepore (COOPER & LEPORE; Daniel Dickinson, ROBINSON & DICKINSON on brief) for Appellant. Peter R. Rich (Carl N. Frankovitch, John A. McCreary, Jr., VOLK, FRANKOVITCH, ANETAKIS, RECHT, ROBERTSON & HELLERSTEDT on brief) for Appellee.

CORRECTED OPINION
(Correction made
to cover page)

WILKINSON, Circuit Judge:

ERISA, 29 U.S.C. §§1001 *et seq.*, requires a plan fiduciary to disclose to a plan participant the specific reasons for a denial of benefits. The question here is whether that obligation requires a fiduciary to disclose to a discharged employee, who applies for early retirement benefits, the reasons for his discharge if the denial of benefits is otherwise in accordance with the plan. The district court held that ERISA created no such obligation here. We affirm.

I.

Plaintiff Andrew P. Dzinglski worked for defendant Weirton Steel Corporation from May 12, 1959 until his termination for cause on October 31, 1984. At the time of his discharge he was 46 years old. Weirton maintains a pension plan in which plaintiff was a participant. The plan is administered by the Retirement Committee of the Weirton Steel Corporation Retirement Plan.

The Weirton plan provides an early retirement "Rule-of-65" pension. The Rule-of-65 pension provides eligible employees with an actuarially unreduced early retirement

benefit in addition to a \$400 monthly supplement, paid until normal retirement age. Eligibility for the Rule-of-65 pension is conditioned upon the attainment of minimum age and years of service and the occurrence of one of several contingencies. For hourly employees, for example, the contingencies include: service broken by reason of a layoff or disability; absence from work by reason of layoff resulting from an election to be placed on layoff status pursuant to the agreement applicable in the event of a permanent shutdown; absence from work by reason of a physical disability or layoff where return to active employment is declared unlikely by Weirton; or retirement that Weirton and the employee consider to be in their respective interests.¹ The relevant contingency here is the mutual stipulation of both the employee and Weirton that the employee's retirement is in their respective interests.

¹ The relevant plan provision provides:

Any Participant (i) who shall have had at least 20 years of Service as of his last day worked, (ii) who has not attained the age of 55 years, and (iii) whose combined age and years of Service shall equal 65 or more but less than 80, and

- (a) in the case of a Participant who is an Hourly Employee or a Salaried Employee—whose Service is broken by reason of a layoff or disability, or
- (b) in the case of a Participant who is a Salaried Employee—whose Service is not broken and who is absent from work by reason of a physical disability or a layoff and whose return to active employment is declared unlikely by Weirton, or
- (c) in the case of a Participant who is an Hourly Employee—whose Service is not broken and who is absent from work by reason of layoff resulting from his election to be placed on layoff status pursuant to the provisions of the Basic Agreement applicable in the event of a permanent shutdown, or
- (d) in the case of a Participant who is an Hourly Employee—whose Service is not broken and who is absent from work by reason of a physical disability or a layoff other than a

Plaintiff applied for a Rule-of-65 pension the day he was terminated. He met the age and service criteria but Weirton did not consider his retirement to be in its interest. Accordingly, by letter dated November 5, 1984, the Retirement Committee denied plaintiff's application, informing him that Rule-of-65 benefits are not available where "service has been broken for reasons other than layoff or disability, and Company approval for such benefits has not been granted." Plaintiff appealed this denial and a hearing was held before the Retirement Committee on March 18, 1985. On April 12, 1985, the Committee affirmed its denial of plaintiff's application for the reasons set forth in its November 5, 1984 letter.

Plaintiff filed suit in the Northern District of West Virginia on October 22, 1985, alleging that defendants' denial of pension benefits violated ERISA's internal review and notice provisions. The district court determined that plaintiff failed to state a claim upon which relief could be granted. Specifically, the court

(Footnote continued from preceding page.)

layoff resulting from an election referred to in subparagraph (c) above and whose return to active employment is declared unlikely by Weirton, or

(e) in the case of a Participant who is an Hourly Employee or a Salaried Employee—who considers that it would be in his interest to retire, and Weirton considers that such retirement would likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions, and who has not been offered suitable long-term employment (hereinafter "SLTE") by Weirton shall be eligible to retire and shall upon his retirement on or after the Effective Date (hereinafter "rule-of-65 retirement") be eligible for a pension....

This is one of many provisions for early retirement in the Weirton Plan, including: "62/15 Retirement," "30 Year Retirement," "60/15 Retirement," "Permanent Incapacity Retirement," and "70/80 Retirement."

found that 1) Rule-of-65 retirement, "conditioned upon Weirton's consent, does not violate ERISA;" 2) Rule-of-65 retirement does not violate ERISA's reporting and disclosure requirements; 3) Weirton's determination that plaintiff's early retirement was not in its interest was not undertaken in a fiduciary capacity; and 4) "plaintiff was not deprived of a full and fair review of his retirement application by the Retirement Committee by reason of the alleged nondisclosure of Weirton's reason for not finding Plaintiff's retirement to be in its interest[]."

Plaintiff appeals.

II.

The Weirton plan provides in relevant part that:

- (b) The Retirement Committee shall have all powers and duties necessary or appropriate to operate and administer the Plan, including, but not limited to, the following specific functions:
 - (1) To act on applications for benefits.
 - (2) To determine eligibility, service, earnings, and other questions.

The Retirement Committee ascertains eligibility by determining whether an applicant meets Rule-of-65 criteria: whether the applicant meets minimum age and years of service requirements and, in this case, whether there exists the mutual assent of both the employee and Weirton that the employee's retirement is in their respective interests.

ERISA requires that every employee benefit plan provide written notice to any participant of the reasons an application for benefits is denied and a reasonable opportunity for a full and fair review of the denial by an appropriate fiduciary. 29 U.S.C. §1133. Dzinglski argues

that he did not receive a fair hearing under 29 U.S.C. §1133 because the Retirement Committee did not disclose to him the precise reasons that Weirton did not determine his retirement to be "in its interest," thus preventing him from contesting the reasons for Weirton's refusal of his claim for benefits. He claims it is not sufficient for a fiduciary to inform a participant that the employer does not agree that retirement is in its interest. The fiduciary must further advise the participant why the employer refuses to agree.

We disagree. ERISA's obligation to notify a participant of the reasons for the denial of benefits does not require a plan fiduciary to disclose an employer's specific reasons for determining that an employee's application for early retirement is not in its interest. The plan does not permit the Retirement Committee to examine Weirton's decision in that regard. It does not authorize the Retirement Committee to determine Weirton's interest, only to ascertain Weirton's assent. A trustee must strictly adhere to the terms of the plan and inform a participant of the reasons for the denial of his benefits according to the plan, not advance an employer's separate determination of its own interests. *Hlinka v. Bethlehem Steel Corporation*, 863 F.2d 279, 286 (3d Cir. 1988); *Hickman v. Tosco Corporation*, 840 F.2d 564, 566 (8th Cir. 1988); *Moehle v. NL Industries, Inc.*, 646 F. Supp. 769, 777 (E.D. Mo. 1986), aff'd, 845 F.2d 1027 (8th Cir. 1987); *Foltz v. U.S. News & World Report, Inc.*, 613 F. Supp. 634, 639 (D.D.C. 1985).

The Retirement Committee did, of course, hold a hearing and inform Dzinglski why his benefits were denied. By letter dated November 5, 1984, the Committee notified appellant that his application was denied because "Rule-of-65 retirement benefits are not

available where, as in your case, service has been broken for reasons other than layoff or disability, and Company approval for such benefits has not been granted." Following a hearing, requested by appellant, the Committee reaffirmed its denial of appellant's application for the reasons set forth in the letter of November 5.

While Dzinglski claims the Committee's explanation for the denial was inadequate, the sufficiency of the explanation is not to be judged in a vacuum but under the terms of the plan. In terms of the plan the statement of reasons was adequate. There was no dispute that Dzinglski met the objective criteria of age and service. There was also no dispute that eligibility under the plan was premised upon the employer's assent and that assent in Dzinglski's case had been withheld.

We reject appellant's attempt to transform the provisions of this early retirement plan into a forum for a wrongful discharge action. To require a fiduciary to disclose the specific reasons for Weirton's determination converts ERISA's disclosure and internal review obligations into a procedure wherein the participant can contest an employer's assessment of its own interests and ultimately, if applicable, the reasons for an employee's discharge. If Dzinglski's claim is that Weirton erred in discharging him for cause rather than permitting him to retire, that too is simply a variation of a wrongful discharge suit. In either case, the reasons for the discharge and Weirton's conduct in ordering it would be placed in dispute.

An employee's discharge may properly be litigated pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-34, the relevant collective bargaining agreement, or exceptions

to the employee-at-will doctrine. If there is a wrongful discharge, the remedial provisions of the foregoing actions may well encompass an award of benefits. To subject employers to a potential waterfall of wrongful discharge actions, by permitting plan participants to litigate the correctness of their discharge through the "full and fair review" provision of ERISA, would discourage employers from instituting early retirement plans, which ERISA does not require. *Hlinka*, 863 F.2d at 284.

Dzinglski contends, in essence, that the provision in issue has a high-handed quality because it permits the employer to declare unilaterally that early retirement is "not in its interest." Dzinglski does not allege, however, that the plan here is improper and indeed plans which condition eligibility for early retirement benefits on an employer's determination that an employee's retirement is in its interest are permissible. *Hlinka*, 863 F.2d at 284. There is no requirement that employee benefit plans in collective bargaining contracts, for example, withstand judicial review under a general standard of reasonableness. *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 574-76 (1982); *Viggiano v. Shenango China Div. of Anchor Hocking Corp.*, 750 F.2d 276, 279-80 (3d Cir. 1984). Rather, "Congress left employers much discretion in designing their plans" under ERISA and in determining the level and conditions of benefits. *Hlinka*, 863 F.2d at 283. The judicial role is not to rewrite plan provisions, but to assure that they are fairly administered.

If there is a magisterial tone to the Weirton plan provision it derives from the fact that under ERISA the institution of plans is largely voluntary and the fashioning of plan elements has been left largely in the

hands of individual employers. Here Weirton has designed a plan whose primary beneficiaries were apparently those whose Rule-of-65 retirements resulted from disability, layoffs, or force reductions, and not from termination for cause. See Weirton Plan, note 1, *supra*. While there may be limits on the extent to which an employer can avoid judicial review of plan administration by shifting the effective decision to deny benefits from a plan fiduciary to itself, we do not think those limits have been exceeded in the context of an early retirement provision which is but one of numerous means of establishing eligibility for such benefits and where all such means are framed in the disjunctive. See note 1, *supra*.

In a case analogous to the present one, Bethlehem Steel Corporation sponsored a "70/80" early retirement pension, conditioning eligibility for the benefit on Bethlehem's determination that an applicant's retirement was "in its interest." *Hlinka*, 863 F.2d 279. The plan administrator refused to grant Hlinka a 70/80 pension because Bethlehem declined to make the requisite determination. The Third Circuit concluded that the denial of Hlinka's benefits was proper because Bethlehem did not deem it to be in its interest for Hlinka to retire and such a determination did not violate the spirit of ERISA. *Id.* at 284. The same conclusion is compelled here.

The cases on which Dzinglski relies for the proposition that the Committee should have disclosed to him the totality of evidence supporting the denial of benefits are inapposite; in all of them, *Brown v. Retirement Committee of Briggs & Stratton*, 797 F.2d 521, 532-33 (7th Cir. 1986); *Short v. Central States, S.E. & S.W. Areas Pension Fund*, 729 F.2d 567, 574-75 (8th Cir.

1984); *Richardson v. Central States, S.E. & S.W. Areas Pension Fund*, 645 F.2d 660, 665 (8th Cir. 1981); *Wardle v. Central States, S.E. & S.W. Areas Pension Fund*, 627 F.2d 820, 827 & 828 n.17 (7th Cir. 1980), the trustees were vested with the discretionary authority to grant or deny benefits. Here the Retirement Committee is not vested with discretionary authority. The Retirement Committee can only determine whether Dzinglski met the eligibility standards of the plan, one of which was that Weirton determine his retirement to be in its interest. Appellant presented no evidence that Weirton did so and, accordingly, the Retirement Committee had to deny appellant benefits. Pursuant to *Firestone Tire & Rubber Co. v. Bruch*, 57 U.S.L.W. 4194 (U.S. Feb. 21, 1989), we review the trustee's decision *de novo*, and we find it conforms to the terms of the plan.

III.

A.

Dzinglski also contends that Weirton's refusal to stipulate his retirement was in its interest violated its fiduciary duty pursuant to 29 U.S.C. §1104 and that the Retirement Committee did not act for the sole and exclusive benefit of appellant. *Id.* Neither claim is persuasive.

A "person is a fiduciary with respect to a plan to the extent . . . he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. §1002(21)(A). When an employer is administering an employee benefit plan, that employer "must satisfy the exacting fiduciary standards imposed by ERISA." *Sutton v. Weirton Steel Division of National Steel Corporation*, 724 F.2d 406, 411 (4th Cir. 1983). ERISA, however, does not "prohibit an employer

from acting in accordance with its interests as employer when not administering the plan or investing its assets." *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986). Business decisions can still be made for business reasons, notwithstanding their collateral effect on prospective, contingent employee benefits. *Sutton v. Weirton Steel*, 567 F. Supp. 1184, 1200-01 (N.D.W. Va.), *aff'd*, 724 F.2d 406 (4th Cir. 1983).

Here Weirton's determination of its interests was not fiduciary in nature. It was acting in its capacity as Dzlingski's employer, not as a fiduciary, when it decided to discharge him. The Weirton plan provides that personnel decisions are the exclusive province of Weirton as employer, not as plan sponsor or fiduciary:

Nothing contained in the Plan shall be deemed to give any Employee, Participant or Contributory Participant the right to be retained in the service of Weirton or to interfere with the right of Weirton to discharge, lay off or suspend any Employee, Participant or Contributory Participant at any time without regard to the effect which such discharge, layoff or suspension shall have upon his rights or the rights of any beneficiary, surviving spouse or co-pensioner under the Plan.

In *Moehle v. NL Industries, Inc.*, 646 F. Supp. 769 (E.D. Mo. 1986), the court relied on a similar pension plan provision to conclude that the employer did not have fiduciary duties "when it was acting in its capacity as employer making employment decision." *Id.* at 779 & n.5. See also *Hickman*, 840 F.2d at 567 (employer not acting as fiduciary when deciding which employees to terminate); *Ogden v. Michigan Bell Telephone Co.*, 657 F. Supp. 328, 335 (E.D. Mich. 1987) (employer not acting as fiduciary when determining appropriate number of

employees to be eliminated in force reduction). *But see Fielding v. International Harvester Co.*, 815 F.2d 1254, 1257 (9th Cir. 1987).

Likewise, appellant's contention that the Retirement Committee violated its fiduciary duty is without merit. While ERISA requires a fiduciary to discharge its duties "solely in the interest of the participants and beneficiaries," 29 U.S.C. §1104(a)(1), the fiduciary must do so "in accordance with the documents and instruments governing the plan. . . ." *Id.* at §1104(a)(1)(D). As we have noted, the Retirement Committee acted in accordance with the terms of the plan. To adhere to the plan is not a breach of fiduciary duty. *See Hickman*, 840 F.2d at 566; *Moehle*, 646 F. Supp. at 777; *Foltz*, 613 F. Supp. at 639.

B.

Finally, Dzinglski argues that the Weirton plan violates ERISA's disclosure requirements, 29 U.S.C. §1022, by failing to disclose that Rule-of-65 provisions are not granted to employees discharged for cause. We find no such violation.

Section 1022 requires that a plan description contain information on "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." Although it is not clear whether §1022(a) requires a plan to disclose the circumstances under which forfeitable pension benefits like appellant's may be denied, *Phillips*, 799 F.2d at 1472 n.3, the requirement of Weirton's approval of an application under "mutually satisfactory conditions" is explicitly set forth. *See Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 915 (2d Cir. 1982) ("plaintiff had notice of the fact that the lump sum option was at discretion of the

[pension] Committee" and "such notice reasonably apprised appellant of his rights under the Plan"); *Ogden*, 657 F. Supp. at 335 ("Having found that the decision to implement MIPP [Management Income Protection Plan] was a business decision, the court must conclude that employees had no right under ERISA to be informed of the conditions which activated MIPP."). To require the plan to disclose all the specific circumstances under which Weirton would assent would "undercut the flexibility . . . of the plan," *Pompano*, 680 F.2d at 914, and "foreclose the fair disposition of individual cases presenting unusual or difficult problems." *Romacho v. Stanley*, 567 F. Supp. 1417, 1425 (S.D.N.Y. 1983).

For all these reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

Opinion of the United States District Court, Dated May 19, 1988

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 85-0126-W

ANDREW P. DZINGLSKI,

Plaintiff,

vs.

WEIRTON STEEL CORPORATION and
RETIREMENT COMMITTEE OF WEIRTON
STEEL CORPORATION RETIREMENT PLAN,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, upon review of the pleadings of record and the factual averments of Plaintiff's counsel in his opening statement found *sua sponte* that Plaintiff failed to state a claim upon which relief can be granted as a matter of law. For purposes of its decision, the Court considers the opening statement of Plaintiff's counsel to generally serve as findings of fact in this matter which include the following:

(1) Plaintiff was employed by Defendant Weirton Steel Corporation (Weirton) from May 12, 1959 until his termination effective October 31, 1984. At the time of his termination, plaintiff was 46 years old.

(2) Weirton maintains a pension/retirement plan known as the Weirton Steel Corporation Retirement Plan (Plan).

(3) Defendant Retirement Committee of Weirton Steel Corporation Retirement Plan (Retirement Committee) is the plan administrator of the Plan.

(4) On October 31, 1984, Plaintiff applied for a "Rule of 65" retirement.

(5) The "Rule of 65" retirement is a special type of retirement found in the Plan, which provides for the payment of unreduced pension benefits plus a \$400 month supplement prior to normal retirement age.

(6) Eligibility for the "Rule of 65" retirement is conditioned upon the attainment of minimum age and service requirements and the occurrence of one of three alternative criteria. For purposes of this case, the only condition precedent to the "Rule of 65" retirement at issue is stated in the Plan as follows:

in the case of Participant who is an Hourly Employee or a Salaried Employee—who considers that it would be in his interest to retire, and Weirton considers that such retirement would likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions....

(7) Plaintiff satisfied the minimum age and service requirements for the "Rule of 65" retirement.

(8) Weirton did not consider that Plaintiff's retirement would be in its interest and did not approve an application for retirement under mutually satisfactory conditions.

(9) By letter of November 5, 1984, the Retirement Committee denied Plaintiff's application for a "Rule of 65" retirement for the reasons set forth therein. Specifically, Plaintiff was advised that Weirton's approval for the "Rule of 65" benefits had not been granted (Exhibit 3 to Plaintiff's Complaint).

(10) By letter of January 3, 1985, Plaintiff requested further review of his pension application by the Retirement Committee.

(11) By letter of January 30, 1985, Plaintiff requested a hearing before the Retirement Committee.

(12) A hearing was held on March 18, 1985 before the Retirement Committee.

(13) By letter of April 12, 1985, the Retirement Committee denied Plaintiff's application for the "Rule of 65" retirement for the same reasons set forth in its letter to Plaintiff of November 5, 1984.

(14) Plaintiff alleges, and for purposes of this disposition, it is assumed that Plaintiff was not advised by Weirton or the Retirement Committee why Weirton did not consider it to be in its interests for plaintiff to retire and did not approve Plaintiff's application for a "Rule of 65" retirement.

The Court finds that Plaintiff's averment of fact, considered as if true, fail to state a claim upon which relief can be granted. Specifically, the Court makes the following conclusions of law:

(1) The Court's jurisdiction is based upon the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001, et seq., as amended.

(2) Weirton's "Rule of 65" retirement is a special retirement which provides for the payment of increased pension benefits to eligible Plan participants prior to normal retirement, as defined at 29 U.S.C. §1056(a).

(3) Weirton's "Rule of 65" retirement, conditioned upon Weirton's consent, does not violate ERISA.

(4) Weirton's "Rule of 65" retirement is not unlawfully vague, arbitrary or unreasonable under ERISA's reporting and disclosure requirements as set forth at 29 U.S.C. §1022.

(5) Weirton's determination that early retirement by Plaintiff was not in its interests and its refusal to approve Plaintiff's application for retirement was not undertaken in a fiduciary capacity as defined at 29 U.S.C. §1002(21)(A). Accordingly, the reasons for Weirton's decision need not be disclosed to Plaintiff under ERISA.

(6) Plaintiff was not deprived of a full and fair review of his retirement application by the Retirement Committee by reason of the alleged non-disclosure of Weirton's reasons for not finding Plaintiff's retirement to be in its interests and not approving Plaintiff's application for the "Rule of 65" retirement.

(7) Plaintiff states no claim cognizable under ERISA.

In summary, the Plan requires the consent of both Weirton and a Plan participant to special early retirement under the "Rule of 65". The Plan does not compel the consent of either party to early retirement nor require either to state their reasons for withholding

consent. For purposes of this disposition, the Court assumes Plaintiff's averments of Weirton's nondisclosure of its reasons to be true. The Court finds that ERISA does not require such disclosure. Accordingly, judgment for defendant shall be GRANTED and this action is DISMISSED.

It is so ORDERED.

Judgment shall be entered accordingly.

The Clerk is directed to transmit certified copies of this Order to counsel of record herein.

Dated the 19 day of May, 1988.

ENTER:

WILLIAM P. GRAY
William P. Gray
United States District Judge

I hereby certify that the annexed instrument is a true
and correct copy of the original filed in my office.

ATTEST: Dr. Wally Edgell
Clerk, U. S. District Court
Northern District of West Virginia

By: LUKE A. LAFFERN
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 85-0126-W

ANDREW P. DZINGLSKI,

Plaintiff,

vs.

WEIRTON STEEL CORPORATION and
RETIREMENT COMMITTEE OF WEIRTON
STEEL CORPORATION RETIREMENT PLAN,

Defendants.

JUDGMENT ORDER

This action came on for consideration upon the pleadings and facts averred by Plaintiff's counsel in his opening statement, the Honorable William P. Gray, United States District Judge, presiding.

The Court having heard the same, determines *sua sponte*, as a matter of law, that Plaintiff fails to state a claim upon which relief can be granted.

It is ORDERED and ADJUDGED

That judgment for defendant shall be GRANTED and this action is dismissed and stricken from the docket of the Court.

Dated the 19 day of May 1988.

ENTER:

WILLIAM P. GRAY
WILLIAM P. GRAY
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.

ATTEST: Dr. Wally Edgell
Clerk, U. S. District Court
Northern District of West Virginia

By: LUKE A. LAFFERN
Deputy Clerk